IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVN.APPLICATION NO.419 OF 2006

Salil A. Chaturvedi .. Applicant

Versus

M.B.Gatade & Ors. .. Respondent

Mr.Tulsi, Senior Advocate with Rizwan Merchant for applicant

Mr.Borulkar, P.P. with S.S.Pednekar, A.P.P. for State.

Ms.Poornima Kantharia for NCB.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 19th December 2006.

P.C.

. Rule. Returnable forthwith by consent.

Respondents waive service.

. This is an application by the applicant original accused No.9 in N.D.P.S. Special Case No.112 of 2005. This special case has been registered pursuant to C.R.No.17 of 2005 lodged with Airport Police Station alleging offences punishable under the N.D.P.S. Act 1985. It is not necessary to set out the facts in great details for appreciating the only submission of Mr.Tulsi, learned Senior Counsel for applicant.

. Applicant - original accused No.9 during the course of the proceedings has preferred an application/private complaint No.1 of 2006. The complaint of the original accused No.9 is that the parties to this complaint, Senior Inspector of Police (Crime) Santacruz Airport Police Station and the other accused searched the premises of accused No.9 - complainant in presence of his family members and himself.

During the search, nothing incriminating was recovered. The accused No.3, one Ashok Bhosale, Inspector of Police, Santacruz Airport Police Station, who was present during the course of this search, requested for permission to visit toilet. After coming out of the toilet, he claimed that he found three vials inside the bath room. Complainant, original accused No.9 and his family members objected to the same. Despite complaints and protests from the family members, police party left the premises with the said vials. They have not followed the legal procedure while carrying out the search and in any event, entire case is bogus and fabricated. The police officers have colluded with each other. They are also guilty of an illegal entry in the office and residence of the complainant so also conducting a false, bogus, fabricated and vexatious seizure of three vials containing some unknown substance. Complainant, therefore, alleges that the police officers are guilty of

offences punishable under section 8(c) of the N.D.P.S. Act, read with Section 29 and 58 thereof. Hence, appropriate action in accordance with law be taken.

2. Upon this complaint being laid, the applicant applied for investigation being carried out invoking the powers of Special Court under section 156 (3) of Cr.P.C. During the course of oral arguments, an objection was raised on behalf of police officers that they were acting in their official capacity and, therefore, provisions of sections 197 of Cr.P.C. are attracted. In other words, prior sanction would be necessary and which is not obtained by accused No.9 - original complainant. In such circumstances, no direction could be issued to commence any investigation and make a report to the Special Judge for N.D.P.S. cases. In other words, sanction would be needed even for the purpose of taking note of the applicant - accused No.9’s request for

investigation and directions under section 156(3) of Cr.P.C. Upholding this objection and observing that in the absence of sanction under section 197 Cr.P.C. no direction can be issued under section 156(3) thereof, the request of the applicant in that behalf has been turned down by the impugned order.

3. Applicant - original accused No.9 is in Revision challenging dismissal of his private complaint No.1 of 2006 by the learned Special Judge for N.D.P.S. cases.

4. Mr.Tulsi while assailing impugned order dated 7th September 2006 submits that the learned Judge was in complete error while holding that prior sanction under section 197 would be necessary even while taking note of the request to commence investigation and issuing a direction in terms of Section 156(3) of Cr.P.C. He submits that learned Judge has clearly over-looked the

distinction in law between "Cognisance" and directing "Investigation". The bar contemplated by section 197 can never be attracted when the Special Judge was exercising jurisdiction under section 156(3) of Cr.P.C. The investigations can very well be ordered and the police can be directed to look into the complaint and make a report to the Court. For issuing such a direction, requirement of sanction under section 197 Cr.P.C. is not necessary. He submits that attention of learned Judge was invited to a binding precedent viz., The Supreme Court decision in the case of Mohammed Yusuf Vs.Afaq Jahan (Smt) & Anr., reported in (2006) 1 S.C.C. 627. He submits that the judgement has been noted by the learned Judge but he refused to follow the same. The reasons for distinguishing the same are not at all convincing. The binding precedent could not have been brushed aside. Even otherwise, the distinction between taking "cognisance" as contemplated by section 197 and

directing investigation under section 156(3) is of such a basic nature that it would not have been overlooked at all. For all these reasons the impugned order be quashed and set aside.

5. Learned A.P.P. has supported the impugned order and contended that the complaint itself would not lie and is not maintainable unless the requirement of prior sanction is satisfied.

6. In my view, Learned Judge ought to have considered the request of the applicant original accused No.9. He had in his application/private complaint, which was already filed, prayed that directions be given to State C.I.D. to conduct investigation in this complaint against police officers/accused and the Special Judge should exercise his powers under section 156(3) of Cr.P.C. in that behalf.

7. Section 156 of Cr.P.C. reads thus:-

"156: Police Officers power to investigate cognisable case :- (1) Any officer in charge of a police station may, without the order of a Magistrate investigate any cognisable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII;

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this Section to investigate;

(3) Any Magistrate empowered under section 190 may order such an

investigation as above mentioned"

8. Section 190 of Cr.P.C. reads thus :-

"190: Cognizance of offences by Magistrates : (1) Subject to the provisions of this Chapter, any Magistrate of the first class,and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer,

> or upon his own knowledge, that such offence has been committed.
>
> (2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

9. A bare perusal of section 156 would indicate that the same falls under Chapter XII entitled "Information to the Police and Their Powers to Investigate". Section 154 which opens the said chapter talks of Information in cognisable cases, whereas section 155 deals with information as to Non-cognisable cases and investigation of such cases. Section 156 provides for powers of police officers to investigate cognisable cases. The investigation can commence without order of a Magistrate, by a

competent officer in charge of a police station, into any cognisable cases which a court having jurisdiction over the local area within the limits of such station would have power to enquire or try under the relevant provisions. Sub-section 2 thereof states that no proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. Sub-section 3 empowers the Magistrate to order an investigation under section 156, provided the said Magistrate must also be empowered under section 190 of the Code. Section 190 of the Code provides for a cognisance of offence by Magistrates. It is not the case of prosecution before me that the Special Judge was not empowered in terms of Section 190 but the submission is that the Special Judge could not have issued any directions unless the mandate of section 197 is complied with.

10. Section 197 deals with prosecution of Judges and Public Servants and falls in Chapter XIV which prescribes conditions for initiation of proceedings. A bare perusal of Section 190 onwards would indicate that the term "cognisance of offence" appears in this Chapter which deals with conditions requisite for initiation of proceedings. Chapter XII under which section 156 falls deals with Information to the Police and their powers to investigate. There is much substance in the contentions of Mr.Tulsi that the requirement of complying with the mandate of section 197 would not arise while the Magistrate is exercising his power under section 156(3) of Cr.P.C.

11. The Supreme Court in this behalf has observed thus:-

> "11. The clear position therefore is

that any Judicial Magistrate, before taking cognisance of the offence, can order investigation under section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognisance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognisable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under section 156(3) of the

> Code that an F.I.R. should be registered, it is the duty of the officer in charge of the police station to register the F.I.R. regarding the cognisable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

12. Once the clear position in law is that any Judicial Magistrate before taking cognisance of the offence can order investigation under section 156(3) of the Code, then as to how this could have been brushed aside by the learned Special Judge is not explained to me at all. Even the learned P.P. found it difficult to support the reasoning of the learned Special Judge. The request ought to have been considered independent of the requirements under section 197 of Cr.P.C. That requirement and compliance with the said provision is an issue which would arise

when the Special Judge is taking congnisance of the private complaint. As of now, all that he is concerned is whether he should exercise his powers under section 156(3) of Cr.P.C. or not and any case is made out by the complainant in that behalf.

13. In my view, the learned Judge has, therefore, committed an error apparent on the face of record in rejecting the private complaint and the request contained therein to order investigation in terms of section 156(3). As held by the Supreme Court, at this stage when cognisance is not being taken, there is no requirement to comply with section 197 of Cr.P.C. The provision and requirement of sanction in terms thereof is a matter which would arise at a subsequent stage.

14. Learned Special Judge’s reasoning in para 6 of the impugned order is totally unsustainable

in law. The request could not have been turned down in the manner in which it has been done. Rule will have to be made absolute in terms of prayer clause (a). Accordingly, revision application succeeds. Impugned order dated 7th September 2006 is quashed and set aside.

15. Learned Special Judge to now consider the request of the applicant, original accused No.9 for investigation in terms of section 156(3) of Cr.P.C. afresh and without insisting on compliance with section 197 of Cr.P.C. All contentions on merits of such a request of both sides are expressly kept open.

16. At this stage Mr.Borulkar contends that the order of this Court may be construed by the learned Special Judge as ordering further investigation under section 156(3) of Cr.P.C. He may consider himself bound to order such investigation.

17. I have no doubt in my mind that the restoration of private complaint itself cannot be construed as a direction for further investigation as apprehended by Mr.Borulkar. All that the learned Special Judge would consider is a request contained in para 20 of the complaint preferred by the applicant original accused No.9 on 3rd August 2005. It would be open for the prosecution to urge that such a complaint for being proceeded further or cognisance being taken would require fulfillment of the requirement of prior sanction. It is open for the Special Judge to pass such orders as are permissible in law. It is not the law, as has been held by the Supreme Court that the complainant is bound to comply with the requirement of section 197 of Cr.P.C. or that the said provision would operate while ordering investigation. As to whether investigation needs to be ordered or not is left to the Special Judge and I have not issued any

directions. Revision application is allowed in the aforesaid terms. Rule is made absolute accordingly.

(S.C.Dharmadhikari, J)